UN

UNITED NATIONS

E

Economic and Social Council

Distr.
GENERAL

E/CN.4/1995/NGO/37
15 February 1995

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-first session
Agenda item 10

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following written statement, which is distributed in accordance with Economic and Social Council resolution 1296 (XLIV)

(13 February 1995)

Sexual slavery and issues of impunity

1. This statement addresses the question of impunity treated in the reports which Mr. L. Joinet and Mr. E. Guissé submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1993/6; E/CN.4/Sub.2/1994/11 and Corr.1) in relation to the so-called "comfort women" or military sexual slavery by Japan during the Second World War. The International Fellowship of Reconciliation requests the Commission to encourage Mr. Joinet and Mr. Guissé as well as the Sub-Commission to take into consideration the following information for further study. IFOR wishes to draw the attention of the Commission to the information in its earlier written statements on the issues (E/CN.4/1994/NGO/19; E/CN.4/Sub.2/1994/NGO/30).

GE.95-11017 (E)

2. Despite its obligations under international law, Japan has failed and has been refusing to punish even a single perpetrator of the crimes committed against the "comfort women", who are estimated to number about 200,000. Furthermore, Japan systematically destroyed almost all of the relevant evidence, which otherwise could have been used to prosecute the perpetrators, and has tried to evade any attempt at punishment by employing various improper measures including refusing to make available official documents.

3. Despite its acknowledgement of the factual elements in its enslavement of the numerous Asian "comfort women", the Japanese Government has been refusing to admit that the conduct of the Japanese Imperial Forces and Government constituted crimes in violation of international law. Japan has no intention to pay any compensation to the individual victims.

4. IFOR believes that Japan has the duty to make monetary reparation because of atrocities and non-punishment of the persons responsible for the crimes mentioned in the earlier written statement (E/CN.4/1994/NGO/19). In the current written statement, IFOR wishes to focus on the legal argument as regards the duty to make monetary reparation on the ground of non-punishment of perpetrators of the crimes. It should be noted that this issue falls outside the scope of any treaties including the San Francisco Peace Treaty signed by Japan.

5. IFOR believes that general principle 2, proposed in the final report of Professor van Boven, Special Rapporteur for the study concerning the right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms, is one of the major grounds for solving the legal questions (E/CN.4/Sub.2/1993/8, para. 137). It reads: "Every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty to take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity from liability for their actions."

6. It is obvious that "the duty to take appropriate action against the violators" includes the duty to punish the perpetrators of the crimes. Therefore, the failure of Japan to punish the perpetrators of the crimes committed by the Japanese Imperial Forces and Government mentioned above constitutes a breach of its obligation under international law. As a result, IFOR believes that Japan is responsible for paying reparation to the victims.

7. The principle proposed by Professor van Boven is based on the traditional theory of State responsibility. In order to formulate the principle, Professor van Boven enumerated various points in international law. IFOR was particularly interested in his preliminary report, in which he cited the judgement on the Chorzow Factory (Indemnity) case of the Permanent Court of International Justice in 1927 (E/CN.4/Sub.2/1990/10, paras. 23-25).

8. IFOR believes that his interpretation of the traditional principle of State responsibility must be shared by all international law scholars. Any international obligation, including the obligation to punish, which is breached by a State's failure to act can be a basis for restitution. This restitution must include monetary reparation.

9. IFOR has studied whether there were examples of judgements in international arbitration made on the basis of the legal principle of the duty to pay monetary reparation on the ground of non-punishment. Professor Ian Brownlie of Oxford University says in his Principles of Public International Law (Fourth edition), (Clarendon Press: Oxford, 1990, pp. 464-465): "Thus in the Janes claim the United States presented a claim based on a failure by Mexico to take adequate steps to apprehend the murderer of an American citizen. The award saw liability in terms of the damage caused to the individuals concerned rather than to the United States, and gave compensation to the relatives of Janes for the 'indignity' caused by the non-punishment of the criminal. However, the United States was making no claim apart from that 'on behalf of' the dependents of Janes, and the Claims Commission was concerned to translate the Mexican breach of duty into damages." The United States, on behalf of the Janes' family, was awarded $12,000. It should be noted that the judgement in the Janes case was handed down on 16 November 1925 (The Reports of International Arbitral Awards, volume IV, Decisions of Claims Commissions Mexico-United States, p. 82), which was earlier than the period of the 1930s and 1940s, during which the "comfort women" victims were enslaved.

10. This case is not an isolated one. Many more cases of "monetary reparation on the ground of non-punishment" were published in the work cited above as follows:

(a) Roper case: (judgement of 4 April 1927, p. 145). An American sailor was assaulted by Mexican policemen and subsequently drowned, possibly as a result of having been shot. The Mexican Government declined responsibility;

(b) Putnam case: (judgement of 15 April 1927, p. 151). The victim was shot to death by a Mexican policeman. The perpetrator was found guilty of murder, but escaped;

(c) Massay case: (judgement of 15 April 1927, p. 155). An American was killed by a Mexican. The perpetrator was arrested and detained, but escaped with the help of a guard;

(d) Mallen case: (judgement of 27 April 1927, p. 173). A Mexican consul was injured by the violence committed by an American police officer during the course of arresting him for carrying a pistol, which the consul was lawfully entitled to carry. The perpetrator was ordered to pay a fine, but no record for enforcement of this punishment was found;

(e) Stephens case: (judgement of 15 July 1927, p. 265). The brothers of an American killed by a Mexican soldier asked for compensation. Mexico failed to punish the soldier;

(f) Chase case: (judgement of 26 September 1928, p. 337). An American who was seriously injured by a Mexican asked for compensation. The indictment of the perpetrator was not pursued after he fled after having been released on bail;

(g) Morton case: (judgement of 2 April 1929, p. 428). An American was shot to death by a Mexican army officer. Eye-witnesses were not called and the sentence by a Mexican court to four years' imprisonment was not severe, since the officer was allowed his freedom;

(h) Mecham case: (judgement of 2 April 1929, p. 440). An American resident in Mexico was killed by bandits. The guilty parties were pursued and found, but the authorities refused aid, in the absence of a formal warrant for arrest and ordered attempts to apprehend the guilty parties to cease. The Mexican Constitution permitted arrest without a warrant in urgent cases;

(i) Kling case: (judgement of 8 October 1930, p. 575). An American man was shot to death by reckless Mexican soldiers. The American Government claimed compensation on behalf of the mother. The soldiers were not punished;

(j) Mead case: (judgement of 29 October 1930, p. 653). An American was killed by bandits in Mexico. A cursory search was made for the assailants. Some arrests were made but no one was ever tried or punished for the crime. A voluntary witness reported to the authorities the name of the alleged criminal but no action thereon was ever taken by the authorities.

11. In the light of these 11 cases of arbitration, it can be stated that the principle of the duty to pay monetary reparation on the ground of non-punishment was established as early as the 1920s.